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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Federal Communications Commission

WASHINGTON, D.C. 20554

DUPLICATE

In re Application of

GAF BROADCASTING COMPANY, INC.

For Renewal of License of Station
WNCN(FM), New York, NY

File No. BRH-901201WL

To: The Chief, Mass Media Bureau

CONSOLIDATED RESPONSE AND MOTION TO STRIKE

GAF BROADCASTING COMPANY, INC.

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Dated: October 15, 1992

TABLE OF CONTENTS

	<u>Page</u>
Summary	i
Background	2
Resolution of the NAACP's Petition	3
Class' Hearing Request.	7
NAACP's Ex Parte Waiver.	11

Summary

GAF Broadcasting Company, Inc. ("GAF"), licensee of WNCN(FM), New York, NY, herein responds to various comments on its settlement agreement with the NAACP filed by Class Entertainment and Communications, L.P. ("Class"), the Listeners' Guild, Inc. and the Fidelio Group, Inc. ("Fidelio") (the "Commenters"). Two of the Commenters are self-interested applicants for WNCN's frequency, who have never before commented on WNCN's EEO record.

The Commenters assert that the proposed settlement cannot fully resolve the allegations raised by the NAACP's Petition To Deny WNCN's renewal application, despite the NAACP's own representations in the Joint Request For Approval Of Settlement

GAF also moves herein to strike certain portions of Class' comments which constitute an unauthorized request for hearing issues. Class, a self-interested applicant for WNCN's frequency, never before raised EEO issues concerning the station. It should not be permitted to supplement its Petition To Deny with additional arguments now, more than a year late, or to file a motion to enlarge prior to designation of a hearing.

Finally, the Commenters object to the NAACP waiving its ex parte right to be present during any presentation by GAF to advocate approval of the Joint Request or dismissal of the NAACP's Petition To Deny. In doing so they misunderstand the Joint Request. While the NAACP waived its own right to be present during any presentation to advocate the grant of their Joint Request, it did not purport to waive any other party's rights.

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CONSOLIDATED RESPONSE AND MOTION TO STRIKE

GAF Broadcasting Company, Inc. ("GAF"), licensee of WNCN(FM), New York, NY, herein responds to the Comments On Joint Request For Approval Of Settlement Agreement filed by Class Entertainment and Communications, L.P. ("Class") and Response of Listeners' Guild, Inc. (the "Guild") to Joint Request For Approval Of Settlement Agreement, both filed on September 29, 1992, and to the Comments Of The Fidelio Group, Inc. ("Fidelio") Concerning Joint Request For Approval Of Settlement Agreement, filed October 5, 1992. (Hereafter, the three groups are collectively referred to as the "Commenters.")

GAF also moves to strike portions of Class' Comments which clearly constitute an illegitimate request for hearing issues.

Background

The NAACP filed a Petition To Deny GAF's renewal application for WNCN on May 1, 1991, in which it questioned the station's EEO record. GAF contested those allegations as part of its July 1, 1991 Consolidated Opposition To Petitions To Deny ("Consolidated Opposition") which, GAF believes, fully established that WNCN has maintained an effective EEO program. Nevertheless, GAF entered into negotiations with the NAACP which resulted in a settlement agreement filed with the Commission on September 14, 1992, pursuant to which WNCN would adopt modifications to its EEO procedures as specified therein.

The Joint Request For Approval Of Settlement Agreement filed by the NAACP and GAF represented that their agreement, if approved, would fully resolve the NAACP's allegations, and requested that no EEO conditions be imposed on WNCN in connection with the disposition of its renewal application. In addition, the NAACP waived its ex parte right to be present during any presentation by GAF to advocate approval of the Joint Petition and dismissal of the NAACP's Petition To Deny.

Two of the Commenters, Class and Fidelio, are not public

WNCN's EEO record. The Guild does purport to represent WNCN listeners, although its longtime Chairman is now pursuing the station for himself as the principal of Fidelio. None of the three Commenters specifically objects to the settlement itself. Each seeks to preserve the allegations of the NAACP, however, despite the fact that NAACP is now satisfied that its concerns have been resolved.

Resolution of the NAACP's Petition

Initially, the Commenters assert that the proposed settlement cannot fully resolve the allegations raised in the NAACP's Petition To Deny, despite the NAACP's own representations in the Joint Request that it would. Class, for example, argues that "GAF may not use the settlement agreement with the NAACP to avoid a full evaluation of its EEO record." On the contrary, GAF recognizes that WNCN's complete EEO record, like that of every radio licensee, is subject to review by the Commission's staff at renewal time. In no way does it seek to "lloyd" this review. Thus, GAF has fully responded to the

GAF does submit, however, that the NAACP, as a private petitioner, is entitled to obtain assurances from GAF which will resolve its concerns, and thus seek the dismissal of its Petition. Fidelio asserts that the public interest cannot be "ignored" where a private party seeks to withdraw the questions it raised "in return for certain consideration." But Fidelio's inference that the NAACP withdrew its concerns just for money ignores the plain truth. While the NAACP would receive reimbursement of its expenses -- which is perfectly proper -- GAF has agreed to adopt modifications to its EEO practices which satisfy the NAACP's concerns. Indeed, these practices will involve the NAACP itself. For example, GAF will notify the NAACP and other organizations chosen in consultation with the NAACP of job openings, implement a modified minority internship program in consultation with the NAACP, and endeavor to meet at least twice yearly with the NAACP. Such a settlement is fully consistent with FCC EEO policy, which is to enforce affirmative action requirements primarily through prospective remedies. *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 507 (D.C. Cir. 1988).

The NAACP obviously believes that the settlement will fully satisfy its concerns with WNCN's EEO program and serve the public interest. The fact that the NAACP is now satisfied that WNCN's future program will be effective, and believes that

no EEO conditions need be imposed, is clearly relevant to the Commission's review of WNCN's EEO record.

The Commenters support their arguments by citing *Dixie Broadcasting, Inc.*, FCC 92-391, HDO, released September 3, 1992, in which the Commission allowed the NAACP to withdraw its petition to deny a renewal application pursuant to a settlement with the licensee, but nevertheless designated the renewal application for hearing. The Commission's order in *Dixie Broadcasting* did not consider the NAACP's allegations, however, but rather those of the National Black Media Coalition, which did not participate in the settlement agreement. Moreover, the Commission designated the application for hearing because "[i]n the renewal application, opposition pleading and three responses to Commission inquiries, the licensee appear[ed] to have misrepresented critical facts about its EEO program." *Id.* at ¶ 12. After repeatedly representing under penalty of perjury that it had only 20 hiring opportunities during the license term, the licensee finally admitted that there were actually 104 such opportunities. The Commission found that the

the Commission designated a hearing in a case involving blatant misrepresentations, where a second petitioner's allegations remained outstanding, does not here require the Commission to disregard the NAACP's request that its petition be withdrawn.

Both Class and the Guild emphasize that WNCN's 1991 Annual Employment Report indicated two fewer minority employees overall (6 of 28). including one fewer in the top four cate-

demonstrate the inadequacy of a licensee's EEO efforts." *Miami Renewals*, 5 FCC Rcd 4893, 68 RR 2d 147, 150 (1990). See *Catawba Valley Broadcasting Co.*, 3 FCC Rcd 1913, 64 RR 2d 1207, 1209 (1988), *pet. for recon. dismissed*, FCC 89-99, released April 10, 1989 (the processing guidelines are not quotas or numerical goals which, if not attained, warrant FCC sanction; the focus of review is whether efforts were reasonable under all circumstances). Thus, the Commission has unconditionally renewed licenses for stations with minority employment levels which were further from parity. See, e.g., *Miami Renewals*, 68 RR 2d at 150-51 (granting unconditional renewals to radio stations WNWS(AM) and WLYF(FM), Miami, FL, despite overall employment at less than 50 percent parity and top four employment at less than 25 percent parity). GAF's Consolidated Opposition noted the loss of two minority employees overall from 1990 to 1991, but emphasized WNCN's continuing commitment and positive results to increasing minority employment. Consolidated Opposition at 51, n. 24.

Class' Hearing Request

Class seeks not simply to preserve the NAACP's concerns but to cynically exploit them for its own purposes, notwithstanding even the NAACP's request that its Petition be dismissed. Class' Comments now assert, for the first time, that "GAF's EEO record is a matter of decisional significance

in this comparative renewal proceeding." Class further claims that "[e]ven if the Commission determines that a basic qualifications issue shall not be specified against GAF, it should authorize inquiry into GAF's EEO record under the renewal expectancy element of the standard comparative issue." Class Comments at 3.

GAF respectfully requests that these claims now be stricken as unauthorized requests for hearing issues. Initially, Class utterly failed to make any allegations concerning WNCN's EEO record in its Petition To Deny, which it filed one day prior to the final deadline for such petitions-- May 1, 1991. See 47 C.F.R. 73.3584(a). It may not supplement that Petition now, well over one year later, through a pleading disingenuously titled as Comments. Moreover, contrary to Class' reference to "this comparative renewal proceeding," no hearing has been designated. As Class is well aware, the Commission will not accept a motion to add hearing issues prior to release of a hearing designation order. *Bennett Gilbert Gaines*, 5 FCC Rcd 2052 at ¶ 7 (HDO 1990); *Fox Television Stations, Inc.*, 5 FCC Rcd 5255 at n. 3 (HDO 1990).

As the Court of Appeals has pointed out, "because its affirmative action policy is prospective, the Commission rarely holds hearings on renewal applications solely for the purpose of investigating a licensee's affirmative action performance." *Beaumont Branch of the NAACP*, 854 F.2d at 507; *Bilingual*

Bicultural Coalition v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978). In most cases, substantial and material questions of fact warranting a hearing may be shown by evidence of "actual discriminatory conduct" but not by minor statistical disparities between a licensee's EEO data and the available minority work force. Even evidence of substantial statistical ~~disparities may not require a hearing.~~ 595 F.2d at 628. 3c

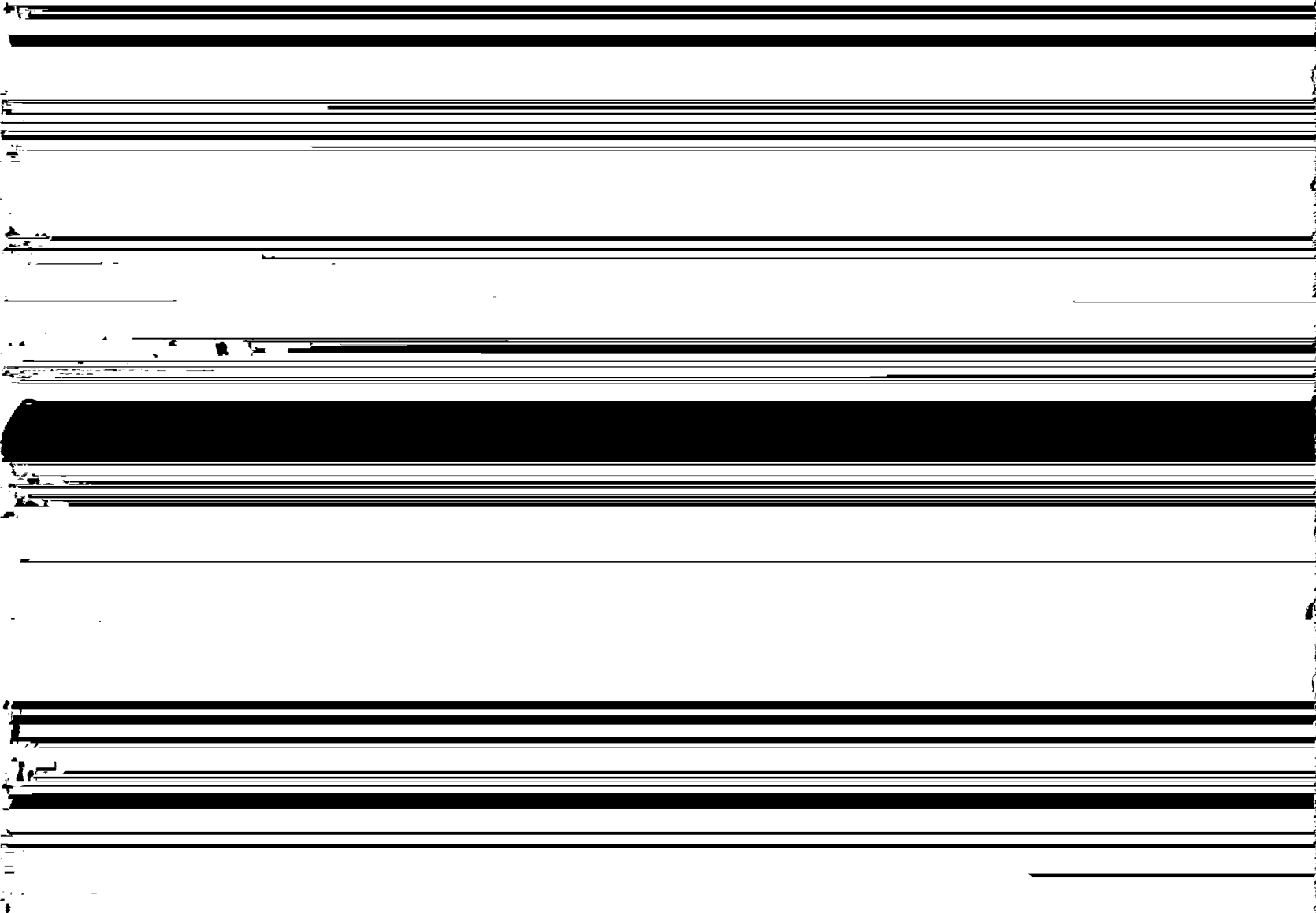
Accordingly, there is absolutely no factual support for Class' claim to a basic qualifying issue based upon GAF's EEO record.

Finally, the Commission should not ignore Class' tactics in seeking issues now through its Comments on a settlement agreement. Class, an applicant for WNCN's frequency, previously submitted a Petition To Require Filing Of Early Renewal Application and a Petition To Deny which simply parroted the meritless character issues previously made by the Guild in its Petition To Deny GAF's 1998 transfer application. As the

faction. At a time when the Commission is rightly concerned with abuses to its renewal procedures by competing applicants, it should not permit an experienced renewal challenger such as Class to cynically manipulate the arguments of others for its own strategic purposes.

NAACP's Ex Parte Waiver

Finally, the Commenters object to the NAACP waiving its ex parte right to be present during any presentation by GAE to



between GAF and the NAACP. their ex parte rights would

CERTIFICATE OF SERVICE

I, Claire Winn Marshall, hereby certify that I have this 15th day of October, 1992 placed a copy of the foregoing "Consolidated Response And Motion To Strike" in U.S. First Class Mail, addressed to the following:

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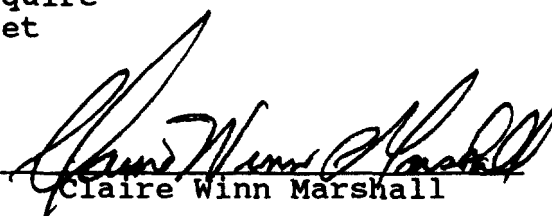
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